



EMPLOYMENT TRIBUNALS

Claimant: Mr Z Mohammed

Respondent: Raja's Indian Cuisine Birchington Ltd

Heard at: Teesside **On:** 16 August 2018

Before: Employment Judge Knowles

Representation:

Claimant: Mr Smith, Solicitor

Respondent: Mr Aamir Suleman, Manager

RESERVED JUDGMENT

1. The Respondent is ordered to pay to the Claimant the sum of £5,703 compensation for unfair dismissal.
2. The Respondent is ordered to pay to the Claimant the sum of £978.60 under the provisions of Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.
3. The Respondent is ordered to pay to the Claimant the sum of £6,000 compensation for unlawful racial harassment, namely injury to feelings.
4. The Respondent is ordered to pay to the Claimant interest on the award for unlawful racial harassment in the sum of £444.
5. The grand total of the above amounts which the Respondent has been ordered to pay to the Claimant is £13,125.60.
6. The recoupment regulations do not apply.

REASONS

Evidence

1. I heard evidence from the Claimant as to his losses. The Claimant produced a bundle of documents, C1, 35 pages.

2. The Respondent attended and was permitted to fully participate in the remedies hearing. They produced no evidence but made submissions.

Issues

3. The sole issue for determination today is remedy. The Respondent was found liable for
 - a. unfair dismissal under Section 98 of the Employment Rights Act 1996
 - b. unfair dismissal under Section 103A of the Employment Rights Act 1996; and
 - c. harassment on ground of race under Section 26 of the Equality Act 2010

in a judgment made by me dated 13 April 2018.

4. At the beginning of the hearing the Respondent made an application to adjourn the matter pending the outcome of their appeal on liability. I declined to make an order to adjourn the hearing because the Respondent had recently made an identical application which had been considered by me and rejected, with reasons having been given to the Respondent in writing previously.

Findings of fact

5. I made the following findings of fact on the balance of probabilities.
6. The Claimant was employed by the Respondent as a tandoori chef and has continuous service with the Respondent which began on 1 January 2014.
7. His employment terminated on 8 October 2017 when it was summarily terminated by the Respondent. The Claimant had raised an objection to Mr Mohammed Suleman, the father of the Managing Director of the Respondent to whom the Claimant reported on a day to day basis, to cooking meat which he considered was unfit for preparation. The Respondent is a family operated business. Mr Arselan Suleman is Managing Director, Mr Aamir Suleman is the Manager and Mr Mohammed Suleman is their father. Mr Mohammed Suleman was present at the workplace and acted as the Claimant's line manager for all practical purposes and the Claimant was required to follow Mr M Suleman's instructions at work. The Claimant had noticed that the chicken which he was asked to prepare had a strong odour and had a green tinge to its colour. Mr M Suleman dismissed the Claimant.
8. The Claimant was 51 years of age at the effective date of termination of employment and had three years of continuous employment.
9. During the conversation Mr M Suleman advised the Claimant, in a heated

manner *"If you're not going to listen to me – get out... I've got powers, I'll get you kicked out of the Country and if you go back home [meaning Pakistan] I'll get you done there... I've got powers."* The Appellant became concerned and began recording the conversation. A certified translation of the conversation is contained in the bundle of documents at pages 25-27. Mr Suleman was shouting and swearing at the claimant. He made comments to the Claimant such as *"I'll vanish you from the world"*, *"get out of here, I'll kick you out of here"*, *"he will be beaten"*, and *"he is worse than a dog"*. The Claimant attempted to pick up his clothes to change out of his chef's whites to leave but Mr Suleman prevented him and threw the Claimant's clothes in the bin. The Claimant left the premises and went home in his chef's whites.

10. The Claimant stated that since he left his employment he has not been sleeping or eating properly. He states he fears for his safety because Mr Mohammed Suleman and his family have been making threats through mutual acquaintances trying to make him drop his employment tribunal claim and attending his local mosque which they never used to do. The Claimant states that Mr M Suleman also owns a taxi business and has been regularly driving past the Claimant's home. The Claimant states that he believes that the purpose of driving past his home is to intimidate him.
11. The Claimant states that he attended his GP's surgery on 24 October 2017 to discuss his symptoms. He states he was diagnosed as having anxiety and prescribed Propranolol (10mg tablets 3 times a day), then Citalopram (10mg once a day). He states that he was advised to go to counselling and has attended two sessions at Middlesbrough and Stockton Mind. The Claimant's bundle of documents contains a GP's report from a Nurse Practitioner at The Erimus Practice in Middlesbrough dated 15 May 2018. This confirms the Claimant's evidence concerning his diagnosis and treatment and states that medication was ceased 16 April 2018.
12. The Respondent has not challenged the Claimant's evidence on any of the above matters.
13. The claimant's earnings at the time of his dismissal were £9,360 gross, £9,213 net. This is £180 gross and £177 net per week. His employment was part time, 24 hours per week. Wage slips are contained in the bundle of documents at pages 20-22.
14. The Claimant was able to find temporary employment at Shurvori restaurant for 3 weeks from 11 December 2017. In this employment he earned £540 in total, and was paid cash in hand.
15. On 2 May 2018 the claimant secured employment at Adil's Pizza in Middlesbrough. He has since left that employment to work for Saffron Indian Cuisine in Bishop Auckland. He has fully mitigated his losses since 2 May 2018. His earnings and hours of work are the same as those when working for the Respondent, statutory living wage for 24 hours per week. Wage slips for the Claimant's new employment are at page 28 in the bundle of documents.
16. The Claimant stated that he has not received any benefits during his

periods of unemployment.

17. The Claimant has put his case quite plainly and his evidence has not been challenged by the Respondent. The Appellant produces a transcript of his conversation with Mr M Suleman and has documentary evidence which is completely supportive of his evidence. There are matters which are not independently supported by evidence, such as the intimidation the Claimant claims to have suffered. Considering the Claimant's evidence in the round and in the absence of any challenge to the Claimant's evidence, I concluded that the Claimant is a credible witness and that his account of his dismissal and the circumstances which followed his dismissal are, on the balance of probabilities, true.

Submissions

18. The Appellant submitted a schedule of loss, pages 30-34 in which a total claim for compensation is made in the sum of £16,622.78 plus interest to be determined.
19. The Respondent submitted that their company is not profitable and if they were found liable to pay that amount of money they would just liquidate the company.

The Law

20. The Employment Rights Act 1996 sets out remedies for unfair dismissal. It states:

118 General

- (1) *Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—*
- (a) *a basic award (calculated in accordance with sections 119 to 122 and 126), and*
 - (b) *a compensatory award (calculated in accordance with sections 123, 124, [124A and 126]).*
- 119 *Basic award*
- (1) *Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*
- (a) *determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
 - (b) *reckoning backwards from the end of that period the number of years of employment falling within that period, and*
 - (c) *allowing the appropriate amount for each of those years of employment.*
- (2) *In subsection (1)(c) "the appropriate amount" means—*
- (a) *one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,*
 - (b) *one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*
 - (c) *half a week's pay for a year of employment not within*

paragraph (a) or (b).

123 Compensatory award

...the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

21. The Equality Act 2010 sets out remedies for unlawful discrimination and provides:

124 Remedies: general

(1) *This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

(2) *The tribunal may—*

...

(b) order the respondent to pay compensation to the complainant;

...

(6) *The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by [the county court] or the sheriff under section 119.*

22. In **Prison Service and ors v Johnson 1997 ICR 275, EAT** the EAT summarised the general principles that underlie awards for injury to feelings:

- a. *awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party*
- b. *an award should not be inflated by feelings of indignation at the guilty party's conduct*
- c. *awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches*
- d. *awards should be broadly similar to the range of awards in personal injury cases*
- e. *tribunals should bear in mind the value in everyday life of the sum they are contemplating, and*
- f. *tribunals should bear in mind the need for public respect for the level of the awards made.*

23. In **Vento v Chief Constable of West Yorkshire Police (No.2) 2003 ICR 318, CA**, Lord Justice Mummery described some of the elements that can be compensated under the head of injury to feelings as 'subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression'.

24. Lord Justice Mummery's gave helpful guidance upon the level of damages for injury to feelings developing three bands of compensation:
- a. *a top band of between £15,000-25,000: to be applied only in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000*
 - b. *a middle band of between £5,000-15,000: for serious cases that do not merit an award in the highest band, and*
 - c. *a lower band of between £500-5,000: appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The Court said that, in general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.*
25. In case law since *Vento* there have been increases to the amount of damages which were given in the guidance, cumulating in 2018 in the case of *De Souza v Vinci Construction (UK) Ltd* 2018 ICR 433, CA. The impact of the development of the case law is that the guideline amounts are now:
- a. *top band £19,800–33,000*
 - b. *middle band £6,600–19,800, and*
 - c. *lower band £660–6,600.*
26. This case preceded the application of Presidential Guidance in which the levels were further updated.
27. In **HM Prison Service v Salmon 2001 IRLR 425**, the EAT gave guidance on award of injury to feelings and the need to ensure that through an additional award for personal injuries there is no double recovery. It stated that although the two awards are distinct in principle, they are not easily separable in practice because it is not always possible to identify when the distress and humiliation suffered as a result of unlawful discrimination becomes a recognised psychiatric illness. The concept of 'injury to feelings' is wide enough to cover anything from minor upset caused by one-off incidents at the lower end of the scale to serious and prolonged feelings of humiliation and depression at the upper end. The EAT saw nothing wrong in practice with tribunals treating the personal injury as having been compensated for under the heading of injury to feelings, as long as the tribunal identifies those aspects of the victim's medical condition that the injury to feelings award is also intended to cover.
28. Regulation 6(1)(a) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 1996/2803 states that for injury to feelings awards the award of interest starts on the date of the act of discrimination complained of and ends on the day on which the employment tribunal calculates the amount of interest which is the 'day of calculation'.
29. For all other awards, interest is awarded for the period beginning on the 'mid-point date' and ending on the day of calculation under Regulation 6(1)(b). The 'mid-point date' is the date halfway through the period

beginning on the date of the act of unlawful discrimination and ending on the day of calculation under Regulation 4(2). No award of interest can be made in relation to losses which will arise after the day of calculation under Regulation 5.

30. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that

- (2) *If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—*
- (a) *the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,*
 - (b) *the employer has failed to comply with that Code in relation to that matter, and*
 - (c) *that failure was unreasonable,*
- the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.*

31. The ACAS Code of Practice on Disciplinary and Grievance matters is a relevant Code of Practice and this contains provisions for informing employees of the problem before they attend a meeting to discuss poor performance, allowing employees to be accompanied at and formal disciplinary or grievance meeting, and allowing an employee to appeal again

Conclusions and findings on remedy

32. The Claimant has in this claim presented a straightforward claim for a basic award, losses from the date of dismissal 8 October 2017 to 2 May 2018 when he mitigated his losses plus an award for loss of statutory rights. He adds to this an award for failure to follow the ACAS Code of Practice on Disciplinary and Grievance matters under Section 207A of the 1992 Act.

33. The Respondent did not comply with the ACAS Code, the Claimant was not invited to a meeting, offered representation or given a right to appeal. The Respondent's failure was unreasonable. In all the circumstances of the dismissal, I conclude that an uplift of 20% is just and equitable.

34. The Claimant did not, on the evidence presented to me, raise a grievance concerning discrimination.

35. The Claimant has included in his schedule of loss a claim for damages for breach of contract, notice pay, however no such claim has been instituted nor has any application to amend the claim been made. Judgment on liability for breach of contract has not been entered.

36. The calculation of compensation for unfair dismissal includes all of the Claimant's financial losses and it would not be appropriate to make a second award in relation to the finding of unlawful harassment. The dismissal was in any event not alleged to be discriminatory, the reach of the Claimant's discrimination claim concerns only comments made by Mr M Suleman during the dismissal discussion about the aftermath where he

made comments concerning the Claimant's right to live in the UK which are routed in the Appellant's national origin and race. Compensation for unlawful racial harassment has therefore been limited to injury to feelings. The Claimant has claimed the sum of £6,000 which I consider to be appropriate total award for the stress and depression suffered following the comments. This is at the upper end of the lower band under Vento principles. The comments were a one-off event and the Claimant's injured feelings would not, I find, have been the entire cause of the Claimant's illness. There were other threats and the Claimant has raised that he has been intimidated after his dismissal. However the Claimant has not asserted that the other comments were racial discrimination or that the intimidation was racial discrimination. The award is in the lower band reflecting the isolated nature of the threat albeit a serious one at the time it was made and one I acknowledge will have contributed to the Claimant's illness.

37. The Claimant's schedule of loss includes a separate claim for aggravated damages however the additional award of £1,000 which has been submitted to be payable as a result of the manner of behavior and failing to take the matter seriously and investigating his claim. However the Claimant has not submitted independent evidence of additional stress and depression caused by the manner in which his claim was handled by the Respondent and an award of aggravated damages is nonetheless the part of the overall claim for injury to feelings. I acknowledge that the Respondent, through Mr M Suleman, acted in a high handed manner in threatening the Claimant but the threat is the totality of his claim of racial harassment. In all the circumstances I consider that it is not appropriate on the facts of this case to make a separate, additional, award for aggravated damages.

38. I do not consider that a separate award for personal injuries is necessary in this case because the Claimant's illness is at its height depression which he appears to have largely recovered from. I have no evidence of continuing illness or any longer term prognosis before me in evidence. Injury and consequential illness in the form of depression is what the award for injured feelings above covers and I do not consider it appropriate to make an additional award for personal injuries.

39. I calculate remedy in this case as follows:

1.	Basic Award	Sub total	Total
	4.5 weeks X £180 per week	£810	£810
2.	Compensatory Award for Unfair Dismissal		
	Losses from 8.10.17 to 2.5.2018 29 weeks X £177	£5133	
	Less income from temporary employment £540	(£540)	
	Loss of statutory rights	£300	£4,893
3.	S207A uplift £4,893 X 20%		£978.60

4.	Compensation for unlawful harassment	£6,000	£6,000
5.	Interest on the award of compensation for unlawful harassment 338 days / 365 days X 8% X £6,000	£444	£444
6.	GRAND TOTAL		£13,125.60

Employment Judge Knowles

Date: 11 September 2018

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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